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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-674

THIRD NATIONAL BANK IN NASHVILLE, *Petitioner*,

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

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INDEX

Opinions Below 1

Jurisdiction 2

Question Presented 2

Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 5

Conclusion 13

Appendix A—Opinion of the Supreme Court of Tennessee A1

Appendix B—Order of the Chancery Court Granting the Preliminary Injunction A12

Appendix C—Memorandum and Order of the Chancery Court of Davidson County, Tennessee Dissolving the Preliminary Injunction and Permitting an Interlocutory Appeal Therefrom A10

Authorities Cited

Statutes

12 U.S.C. § 91 (1970) 2, 5, 8, 9, 10, 11, 12, 13

Act of June 3, 1864, Ch. 106, § 57, 13 Stat. 116 6

Act of March 3, 1873, Ch. 269, § 2, 17 Stat. 603 6

Act of February 18, 1875, Ch. 80, 18 Stat. 320 6

Table of Cases

Earle v. *Pennsylvania*, 178 U.S. 449 (1900) 11

Evans v. *Abney*, 396 U.S. 435 (1970) 12

McClain v. *C.I.R.*, 311 U.S. 527 (1941) 12

Pacific National Bank of Boston v. *Mixter*, 124 U.S. 721 (1888) 2, 7, 8
Van Reed v. *Peoples National Bank*, 198 U.S. 554 (1905) 7, 8
First National Bank of Oakland v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358, *cert. denied* 383 U.S. 829 (1966) 9
Freeman Mfg. Co. v. *National Bank of Boston*, 160 Mass. 398, 35 N.E. 865 (1894) 10
Kemple v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967) 9
Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963) 2, 11, 12
Metropolitan Lumber Co. v. *Fordham National Bank in New York*, 102 N.J. E. 514, 141 A. 742 (1928) 9
National Bank of Savannah v. *Cravens*, 147 Ga. 753, 95 S.E. 246 (1918) 9

OTHER AUTHORITIES

Overman & Hilliker, *State Court's Limited Power to Issue A Preliminary Injunction Against A National Bank*, 92 BANK L.J. 606, 617 (1975) 12

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THIRD NATIONAL BANK IN NASHVILLE, *Petitioner*,

vs.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

Petitioner prays that a writ of certiorari issue to review the final order of the Supreme Court of the State of Tennessee entered herein on August 16, 1976.

OPINIONS BELOW

The opinion of the Supreme Court for the State of Tennessee is published in 541 S.W.2d 139 (1976) and is printed in Appendix A hereto at p. A1. The Chancellor's order granting Respondents' application for a temporary injunction is unreported and is printed in Appendix B at p. A10. The Chancellor's Memorandum and Order dissolving the temporary injunction and granting Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee are unreported and are printed in Appendix C at p. A12.

JURISDICTION

The final order of the Supreme Court of Tennessee was entered on August 16, 1976, and is appended hereto at page A9. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).*

QUESTION PRESENTED FOR REVIEW

Whether, in light of 12 U.S.C. § 91 (1970) and *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888), a state court has jurisdiction prior to a final judgment, to enjoin a national banking association from foreclosing on collateral?

STATUTE INVOLVED

Petitioner relies on Section 91 of the National Banking Act, 12 U.S.C. § 91 (1970) which provides as follows:

> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to

*The issue presented—whether the state court lacked subject matter jurisdiction to temporarily enjoin petitioner, a national bank—"is a separate and independent matter anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiffs' cause of action." *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963). Moreover, unless addressed prior to a hearing on the merits, the issue would consistently evade resolution since a temporary injunction, by its very nature, is operative only prior to a hearing on the merits.

> prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; *and no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.* (Emphasis added).

STATEMENT OF THE CASE

This case arises from an interlocutory appeal taken from an order of the Chancery Court of Davidson County (Nashville) Tennessee dissolving its temporary injunction earlier issued against the petitioner. The relevant and uncontroverted facts are as follows:

1. Petitioner is a national banking association organized under the laws of the United States of America and maintains its principal place of business in Nashville, Tennessee.
2. On May 18, 1973 Petitioner made a construction loan to Respondents evidenced by a $700,000.00 note the payment of which is secured by a deed of trust encumbering real property and improvements.
3. Upon completion of the construction and subject to Respondents' meeting certain conditions within the prescribed time, First and Mid-South Mortgage Company (Permanent Lender) had agreed to provide a permanent loan to Respondents to be secured by the same real property and improvements. Although Petitioner and the Permanent Lender

granted Respondents' requests for two extensions of time, the commitment for permanent financing expired on July 31, 1975. The Permanent Lender refused to make the permanent loan to Respondents based upon its determination that Respondents had not met the necessary conditions.

4. Petitioner determined that Respondents' construction loan was in default in August of 1975 and caused the substitute trustee under the deed of trust to publish notice of foreclosure.

5. On September 26, 1975 Respondents filed a complaint in the Chancery Court of Davidson County, Tennessee seeking to restrain the Petitioner from foreclosing against its collateral. At an *ex parte* hearing, the Chancellor issued a restraining order and ordered the Petitioner to appear and show cause why a temporary injunction should not issue.

6. At the show cause hearing held October 14, 1975, the Chancellor issued a temporary injunction enjoining the Petitioner from foreclosing Respondents' property. See Appendix B at pp. A10-A11.

7. The Petitioner immediately moved the Court to dissolve the injunction for lack of subject matter jurisdiction. In a memorandum filed December 9, 1975 and an order entered January 8, 1976, the Chancellor concluded that Section of the National Banking Act "remove[s] the jurisdiction of the Court to grant temporary injunctions prohibiting the foreclosure of property in which the bank has a security interest," dissolved the injunction, and granted Respondents leave to perfect an interlocutory appeal to the Supreme Court of Tennessee.

8. With one justice dissenting and one not participating, the Supreme Court of Tennessee *held* that, prior to a final judgment Section 91 of the National Bank Act does not bar a state court from issuing a temporary injunction restraining a national bank from foreclosing on its collateral. The Chancellor's order was reversed.

REASONS FOR GRANTING THE WRIT

I.

The Tennessee Supreme Court's Construction of Section 91 of the National Bank Act Is Contrary to the Plain Meaning of the Statute and Is Contrary to Its Construction by The Supreme Court of the United States.

The Tennessee Supreme Court held that Section 91 does not prevent a state trial court prior to final judgment from enjoining a national bank from foreclosing on property in which it owns a security interest. This holding is in direct conflict with the express prohibition of Section 91 of the National Bank Act and with holdings of The Supreme Court of the United States.

A. The Legislative and Judicial History of Section 91.

Section 91 is the result of inartful codifications of amendments, deletions and amalgamations of much earlier legislation.

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1. Act of June 3, 1864, Ch. 106, § 57, 13 Stat. 116.

The anti-injunction prohibitions of Section 91 were first enacted in 1873 as an appendage to Section 57 of the Act of June 3, 1864[1]. Section 57 originally read:

> "That suits, actions, and proceedings against any association under this Act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases; *Provided, however*, That all proceedings to enjoin the comptroller under this Act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

The anti-injunction provisions of the 1873 Amendment to Section 57 read:

> "*And provided further*, That no attachment, injunction, or execution shall be issued against such association, or its property, before final judgment in any such suit, action or proceeding in any state, county, or municipal court."[2]

In 1875, the 1873 Amendment was placed at the end of Section 52 of the National Bank Act and it continues to appear in that form today.[3]

Although Section 52 of the old National Bank Act dealt with the avoidance of preferential transfers of the assets of insolvent national banks, the United States Supreme Court held the appending of the 1873 anti-injunction provision to a section dealing with insolvent national banks does not limit the scope of the prohibition of the 1873 Act.

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2. Act of March 3, 1873, Ch. 269, § 2, 17 Stat. 603.
3. Act of February 18, 1875, Ch. 80, 18 Stat. 320.

The Supreme Court in 1888 held:

> "Although the provision(s) [of Section 91 were] evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> "It was further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true."[4]

Again, in 1905, The Supreme Court held:

> "The language of the latter clause of this section would seem to be too plain to admit of discussion as to its meaning. It in terms forbids the issuing of an attachment, injunction, or execution against a national bank or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court."[5]

B. The Erroneous Construction of Section 91 by the Tennessee Supreme Court.

While the Tennessee Supreme Court did recognize that the anti-injunction provision of Section 91 is not restricted to circumstances involving insolvent national banks, the Tennessee Court nevertheless characterized the above-quoted passages from the *Mixter* and *Van Reed* cases as *obiter dicta*. That is, the Tennessee Supreme Court

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4. *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 727-728 (1888).
5. *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 558 (1905).

held that Section 91 is not an absolute prohibition against the issuance of injunctions prior to final judgment. The Tennessee Court concluded that, despite the plain language of Section 91 and its clear construction in the *Mixter* and *Van Reed* cases, a state court is not prohibited from issuing an injunction against a national bank which is seeking to foreclose on collateral.

It is obvious that the only basis for the Tennessee Court's unprecedented and restricted construction of Section 91 was its desire to obtain a result which comports with its notions of fairness. The opinion states that the Section 91 prohibition applies if a national bank is in the defensive posture of resisting its creditor's attempt to obtain a temporary injunction against the bank or its property but does not apply where a national bank is seeking to foreclose on collateral owned by its resisting debtor. However, the anti-injunction language of Section 91 does not distinguish injunctions sought by a bank's creditors from injunctions sought by a bank's debtors. In short, the Tennessee Court's limited reading of the *Mixter* and *Van Reed* cases is without support in either the language or the purpose of the statute.

A preliminary injunction against a lender restraining its rights of foreclosure is a judicial act which clearly interferes with the bank's property rights and with the bank's management and control of its assets. A preliminary injunction against a bank's contractual right of foreclosure is as much an action against a bank's assets as was the illegal attachment of the bank's funds in the *Mixter* and *Van Reed* cases. In many instances the harm which results from unwarranted and precipitous interference with collateral held by a national bank is as great as the harm from judicial interference with a bank's own funds.

II.

The Tennessee Supreme Court's Construction of Section 91 Deprives National Banks in Tennessee of Powers and Privileges Possessed by National Banks in Other States.

The state court cases consistently have held that the anti-injunction provision of Section 91 does apply where a debtor is seeking to prevent a national bank from foreclosing on its collateral.[6] Mr. Justice Holmes, writing for the Supreme Judicial Court of Massachusetts, laid to rest Respondents' contention that the strictures of Section 91 do not apply to injunctions obtained by a debtor to restrain a national bank's disposition of collateral.

> "The argument is only that it is unreasonable that Congress should go so far; that the presumable motive for the law was to prevent an important wheel of business being stopped; and that this motive could be satisfied by limiting the injunctions mentioned to such as would place the general assets of the bank beyond its control, by mesne process having the effect of an attachment.
>
> "But such arguments are very doubtful ground for giving words an unnatural construction. The words used are of unlimited scope. The limited interpretation gives them an unusual meaning. The prohibition, whether reasonable or not, is intelligible when we

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6. *National Bank of Savannah* v. *Cravens*, 147 Ga. 753, 95 S.E. 246 (1918); *Metropolitan Lumber Co.* v. *Fordham National Bank in New York*, 102 N.J. E. 514, 141 A. 742 (1928); *First National Bank of Oakland* v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358, *cert. denied* 383 U.S. 829 (1966); *Kemple* v. *Security First National Bank of Los Angeles*, 57 Cal. Rptr. 838 (1967). The federal courts have not had occasion to determine the applicability of the anti-injunction provisions of Section 91 to instances in which a debtor seeks to enjoin a national bank's foreclosure on collateral.

consider that, at the time when the prohibition was first passed, any plaintiff was at liberty to sue in the United States courts, and could obtain an injunction there. The fact that this power has been taken away cannot change the construction of the words."[7]

Given the consistent construction of Section 91 by the courts of many states, it is obvious that a national bank foreclosing in Tennessee is subject to restrictions it would not encounter foreclosing in Georgia, Massachusetts or California. The anomaly of the Tennessee Court's holding is illustrated by a hypothetical instance in which a national bank holds a mortgage on a tract of real property located in both Tennessee and Georgia. Foreclosure could not be enjoined in Georgia prior to a final judgment but could be enjoined in Tennessee at any time, without regard to a final judgment.

The novel construction of Section 91 by the Tennessee Supreme Court creates an unwarranted inconsistency in the federal framework which the Congress has created for the regulation of its corporate creations, national banks. The Tennessee Court's construction of Section 91 is repugnant to the notion of uniformity in the federal policy of regulating legal actions against national banks.

III.

The Tennessee Supreme Court Does Not Have the Judicial Power to Create an Exception to a Federal Statute Which Creates Rights and Immunities for National Banks.

The plain language of Section 91 prohibits a state court from issuing an injunction against a national banking asso-

7. *Freeman Mfg. Co.* v. *National Bank of Boston*, 160 Mass. 398, 399, 35 N.E. 865 (1894).

ciation or its property before final judgment in "any suit". There are no exceptions to this unambiguous statutory prohibition.[8]

Unlike the nominal status of the national bank in *Earle* v. *Pennsylvania*[9], the Petitioner's assets are directly and adversely affected by state court action which bars foreclosure on valuable collateral prior to final judgment. Thus, the Tennessee Supreme Court's opinion creates an exception which permits an injunction against the bank's property, *i.e.* the right to foreclose on collateral.

The Congress in Section 91 created a restriction on the manner in which a national bank can be sued. The Tennessee Court's construction of Section 91 constitutes a clear conflict with this federally created restriction. In *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558-559 (1963), the Supreme Court held:

> "National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and *are not to be interfered with by state* legislative or *judicial action*, except so far as the lawmaking power of the Government may permit. *Van Reed* v. *Peoples National Bank*, 198 U.S. 554, 557, 49 L.ed 1161, 1162, 25 S.Ct. 775. Unquestionably, Congress had authority to prescribe the manner and circumstances under which the banks could sue or be sued in the courts and it

8. Injunctions prior to final judgment have been permitted in suits where a national bank is merely a nominal party and has no pecuniary interest which is affected by the issuance of the injunction. In *Earle* v. *Pennsylvania*, 178 U.S. 449, at 454 (1900), Justice Harlan explained: [A]n attachment against a bank or its property as *garnishee* is not an attachment against the bank or its property. . . . It is an attachment to reach the property or interests held by the bank for others."

9. 178 U.S. 449 (1900).

addressed itself to this matter. . . ." (Emphasis supplied)

If a litigant is aggrieved by the manner in which Congress has restricted actions against national banks, "such a situation is a matter for Congress to consider."[10]

Admittedly, in the present case, the Court is called upon to apply a federal statute which creates a favorable judicial immunity for national banks. The response of the Tennessee Court was to fashion an unwarranted amendment to Section 91. Under the Federal Constitution, the judiciary is barred from interposing upon a federal statute the court's own notion of fairness.[11]

> The answer is that we must apply the statute as we find it, leaving to Congress the correction of asserted inconsistencies and inequalities in its operation. *McClain* v. *C.I.R.*, 311 U.S. 527, 530 (1941).

State courts, like the federal courts, cannot construe federal legislation in cavalier disregard of its plain meaning.

> The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations. *Evans* v. *Abney*, 396 U.S. 435, 447 (1970).

If not reversed, the decision of the Supreme Court of Tennessee creates an exception that is so broad and so substantial that it ignores the statute and overrules *Mixter* and *Van Reed*.

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10. *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 563 (1963).

11. *See* Overman & Hilliker, *State Court's Limited Power to Issue a Preliminary Injunction Against a National Bank*, 92 BANK L. J. 606, 617 (1975).

CONCLUSION

The decision reached by three of the five justices of the Tennessee Supreme Court is an erroneous and unwarranted construction of Section 91 of the National Bank Act. The Tennessee decision constitutes an impermissible infringement on the historic, federally created right of national banks to be free from prejudgment injunctive process. The decision invites further unwarranted interference by state action in this area. It is for this Court to preserve the laws of Congress from disingenuous distinctions previously considered and rejected.

Accordingly, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Supreme Court of the State of Tennessee.

Respectfully submitted,

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APPENDIX

APPENDIX A

[OPINION OF THE SUPREME COURT OF TENNESSEE]

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

For Publication

Filed August 16, 1976

Davidson Equity

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,
Appellants

vs

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,
Appellees

Honorable Ben H. Cantrell
Chancellor

OPINION

[FONES, J.]

The question presented by this interlocutory appeal is whether a section of the National Bank Act prohibits a state court from issuing an injunction against a national bank, as mortgagee, temporarily restraining it from foreclosing upon appellant's property.

Appellant brought this action against appellee in the Chancery Court of Davidson County when appellee declared appellant in default on a note secured by a deed of trust on real property and advertised the property for sale, pursuant to terms contained in the deed of trust. Appellant sought to enjoin appellee from proceeding with the foreclosure sale and set forth the grounds upon which it sought the injunction. The Chancellor found, upon the pleadings, exhibits, and arguments of counsel at the show cause hearing, that there existed issues which should be determined upon a full hearing; and that appellants would suffer irreparable harm if the foreclosure sale occurred prior to the hearing. Upon these findings, the Chancellor issued a temporary injunction prohibiting appellee from foreclosing on appellant's property prior to a full hearing on the merits of the cause.

Appellee then moved the Trial Court to dissolve the temporary injunction on the basis that 12 U.S.C.A. §91, denied the Court jurisdiction to issue the injunction. The motion was granted, and the Chancellor allowed appellant a discretionary appeal to this Court.

The statute upon which appellee relies, reads as follows:

> §91. *Transfers by bank and other acts in contemplation of insolvency*
>
> All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation

> thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

Appellee maintains that this statute, and the case law construing it, prohibits the courts of this State from issuing an interlocutory injunction against a national bank under any circumstances. This view necessarily encompasses the position that regardless of the degree of wrongdoing on the part of a national bank against one of its debtors, resulting in irreparable damage, our courts, both state and federal, are prohibited from exercising jurisdiction and allowing an equitable remedy until a full trial on the merits of the cause has been completed. We cannot accept appellee's position as a correct exposition of the law.

The leading case construing the statute is *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S.Ct. 718, 31 L.Ed. 567 (1888). There plaintiffs began a suit against the bank in the United States Circuit Court (now District Court) of Massachusetts by writ of attachment for the amounts owed them. At the time the lawsuit was instituted, the bank was solvent; but it later closed, and a receiver was appointed to wind up its affairs. The question before the Court was whether an attachment could issue against a solvent national bank before final judgment in a suit begun in federal court.

The Court noted that although the prohibition against interlocutory injunctions did not expressly apply to federal

courts, those courts were only authorized to issue attachments in common law causes as provided by the applicable state law. The Court held that the power of state courts to issue attachments (and injunctions) prior to final judgment had been eliminated by the federal statute and that the statute was not limited to protecting insolvent banks:

> Although the provision was evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.
>
> 124 U.S. at 727.

We are of the opinion that the precedential value of the broad language of the last quoted sentence is limited to the facts of the case in which it was spoken, and that the *ratio decidendi* of *Mixter* does not extend to the facts of the case at bar. We reach this conclusion only after a careful search for subsequent decisions of the United States Supreme Court interpreting 12 U.S.C.A. §91. We are unable to find that the *Mixter* rationale has been applied to the converse situation; that is, a situation in which a debtor of a national bank is seeking, by interlocutory injunction, to protect *his* property from wrongful seizure and foreclosure sale by the bank. *See, Van Reed* v. *People's National Bank of Lebanon,* 198 U.S. 554, 25 S.Ct. 775, 49 L.Ed. 1161 (1905); *Mechanics Universal Joint Company* v. *Culhane,* 299 U.S. 51, 57 S.Ct. 81, 81 L.Ed. 33 (1936). Nor have we found any federal court of appeals or district court decisions which make the *Mixter* decision so applicable.

Although we have read with interest the opinions in other states which hold contra to our decision today,

Freeman Mfg. Co. v. *National Bank of Boston,* 160 Mass. 398, 35 N.E. 865 (1894); *Metropolitan Lumber Co.* v. *Fordham Nat. Bank,* 102 N.J.Eq. 514, 141 A. 742 (1928); *First National Bank of Oakland* v. *Superior Court,* 240 Cal.App. 2d 109, 49 Cal.Rptr. 358, *cert. denied* 385 U.S. 829 (1966), we are not persuaded by what appears to be blind reliance on *dicta* in the federal cases. Rather, we look to the purpose of the statute which was to secure the assets of a bank, whether solvent or insolvent, for ratable distribution among its general creditors and to protect national banks in general. *See, e.g., First National Bank* v. *Colby,* 21 Wall. 609, 22 L.Ed. 687 (1874); *Loew's Inc.* v. *Superior Court,* 301 P.2d 64 (Cal.App. 1956).

In our opinion, the decision in *Earle* v. *Penn, et al.,* 178 U.S. 449, 44 L.Ed. 1146, 20 S.Ct. 915 (1900), undermines the literalism accorded by courts of our sister states to the *Mixter* Court's statement that the remedies of attachment, injunction and execution are taken away altogether and cannot be used under any circumstances. A writ of attachment by garnishment was issued and served upon the Chestnut Street National Bank, as garnishee, to reach the assets of one James Long; and upon the answer and interrogatories filed by the bank, judgment was entered against the bank. Shortly thereafter the bank closed, and Earle was appointed receiver. He intervened and moved to vacate the judgment and dismiss the attachment upon the authority of the statute under consideration here. In reviewing the decision of the Supreme Court of Pennsylvania sustaining the attachment and judgment against the bank or garnishee, Mr. Justice Harlan, writing for the court said:

> "Sections 5234, 5235, and 5236, above quoted, have reference to the affairs and property of national banks in the hands of receivers, and the administration of

its assets by the Comptroller; and the words in § 5242, 'no attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court,' are to be construed in connection with the previous parts of the same section declaring null and void certain transfers, assignments, deposits, and payments made after the commission by the bank 'of an act of insolvency, or in contemplation thereof.' With the intent to prevent the application of the bank's assets in the manner prescribed by Congress, or with a view of the preference by the bank of one creditor to another. Whatever may be the scope of §5242, an attachment sued out against the bank *as garnishee* is not an attachment against the bank or its property, nor a suit against it, within the meaning of that section. It is an attachment to reach the property or interests held by the bank for others."

178 U.S. at 453, 454.

In the instant case, appellee is not using the statute as a shield to protect its assets, but is using it to preclude appellant from protecting its own property. True, appellee has a security interest of $700,000 in the property. However, the property is in the form of an office building allegedly worth in excess of $1,000,000 which cannot be sold, or assigned, or spirited away in the dark of the night so as to defeat appellee's security interest. The Chancellor predicated the temporary injunction (before it was dissolved) upon the condition that appellant continue to pay interest on the $700,000 at the contract rate until a final determination on the merits could be made. In short, appellee's security interest in appellant's property was completely protected.

Without the issuance of the temporary injunction, however, appellant's property would have been sold without equity of redemption; and its only remedy would be to bring an action against the bank for damages. This type of inadequate and incomplete relief at law prompted the fashioning of equitable relief, which appellee says is not available in this situation.

Appellee seeks to rely on the procedure of public foreclosure sale sanctioned by the laws of this State, but maintains that appellant is unable to avail itself of the statutory protection of T.C.A. §§23-2401 *et seq.* We cannot allow appellee to avail itself of the law favorable to it and not be bound by that part which accords relief to appellant, *State* v. *Superior Court*, 128 Wash. 100, 222 P. 203 (1924).

We have determined that the United States District Courts in this State would have no jurisdiction to entertain this action, *Bachman* v. *First Mechanics Nat. Bank of Trenton*, 69 F.Supp. 739 (D.C. N.J. 1947); *Rooney* v. *First Wisconsin National Bank*, 332 F.Supp. 108 (1971), and that our State courts provide the only forum in which appellant may obtain relief.

Reversed and remanded to the Chancery Court of Davidson County for proceedings consistent with this opinion. Costs of this appeal are adjudged against appellee.

/s/ Wm. H. D. Fones
Wm. H. D. Fones,
Justice

Concur:
Cooper, C.J.
Harbison, J.
Henry, J., not participating
Brock, J., dissents—see separate opinion

DISSENTING OPINION

[BROCK, J.]

I respectfully dissent. I do so most reluctantly because the majority opinion has reached a just result. It is my view, however, that the last clause of 12 U.S.C.A., § 91, absolutely forbids the issuance by a state court of a temporary injunction or any similar process against a national bank prior to entry of a final judgment or decree. That clause provides:

> ". . .; and no attachment, injunction, or execution, shall be issued against such (national banking) association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

As acknowledged in the majority opinion, the Supreme Court of the United States has construed this provision to apply not only to insolvent national banks but to solvent ones as well. That Court has said that "The remedy is taken away altogether and cannot be used under any circumstances." *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721, 8 S. Ct. 718 (1888). The opinion in the *Mixter* case traces the legislative history of § 91 and makes clear that the intent of Congress was to protect all national banks from all pre-judgment injunctions, attachments, etc., issuing from state courts. The distinction made in the majority opinion between state court actions brought by *debtors* of a national bank and those brought by *creditors* of a national bank is, in my opinion, not a valid one because the harm to the national bank defendant is the same whether the injunction is sought by a debtor or by a creditor. See *First National Bank of Oakland* v. *Superior Court*, 240 Cal. App. 2d 109, 49 Cal. Rptr. 358 (1966), cert. den. 87 S. Ct. 65 (1966); *Miller* v. *Mercantile National Bank of Hammond*, 234 Ind. 202, 125 N.E.2d 720 (1955); *Kemple* v. *Security First National Bank of Los Angeles*, 249 C.A. 719, 57 Cal. Rptr. 838 (1967); *Freeman Mfg. Co.* v. *National Bank of Republic*, 160 Mass. 398, 35 N.E. 865 (1894). A temporary injunction by a debtor restraining foreclosure of a deed of trust belonging to the bank constitutes interference with the assets of the bank in the same way as does an attachment by a creditor of the same deed of trust. Accordingly, I would hold that the Chancellor was correct.

/s/ Ray L. Brock
Brock, J.

SUPREME COURT, NASHVILLE

Davidson Equity

Reversed and Remanded.

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,

Appellants

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,

Appellees

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court

that the decree of the Chancellor be reversed and that the cause be remanded to the Chancery Court of Davidson County for proceedings consistent with the Court's opinion, a certified copy of which will accompany the procedendo on the remand, and for the collection of the costs of the cause below; for all of which, let procedendo issue.

The costs of the appeal will be paid by Third National Bank in Nashville, for which execution may issue if necessary. 8/16/76.

(Brock, J., Dissenting)

APPENDIX B

[ORDER OF THE CHANCERY COURT GRANTING THE PRELIMINARY INJUNCTION]

NO. A-6089

IMPAC LIMITED, INC., F. MURRAY PARKER and JAMES K. WALL,
Plaintiffs

vs.

THIRD NATIONAL BANK and FIRST AND MID-SOUTH MORTGAGE COMPANY,
Defendants

ORDER

This cause having come on to be heard upon application of Plaintiffs for a temporary injunction enjoining Defendant, Third National Bank, from foreclosing that property known as Lots Nos. 8, 19 and 10 on the unrecorded Map of South Brentwood in Davidson County, Tennessee,

pending further orders of this court and a show cause order requiring Third National Bank to appear and show cause if any it has why said temporary injunction should not be granted.

From all of which it appears to the Court, based upon the pleadings, exhibits filed by Plaintiffs, and extensive argument of counsel, that Plaintiffs have sufficiently shown the existence of issues which should be determined upon a full hearing of this cause and that Plaintiffs would suffer irreparable harm if the foreclosure occurred prior to such full hearing.

It is accordingly ordered, adjudged and decreed that Defendant, Third National Bank, is temporarily enjoined from foreclosing the subject property pending the final hearing of this cause upon Plaintiffs posting a bond in the amount of Five Thousand and No/100 ($5,000.00) Dollars and upon Plaintiffs paying the two months interest currently in arrears. It is further ordered, adjudged and decreed that Plaintiffs shall pay said interest monthly and the rentals obtained from the leases on said building shall be applied first to said interest. The interest payments shall be made direct to Third National Bank, on or before the 5th day of each month, a default of which shall automatically dissolve this injunction.

/s/ Ben H. Cantrell
Ben Cantrell, Chancellor
Part One, Davidson Chancery

APPENDIX C

[MEMORANDUM AND ORDER OF THE CHANCERY COURT DISSOLVING THE TEMPORARY INJUNCTION AND PERMITTING AN INTERLOCUTORY APPEAL THEREFROM]

IN THE CHANCERY COURT,
PART ONE,
AT NASHVILLE.

NO. A-6089

IMPAC LIMITED, INC., ET AL

vs.

THIRD NATIONAL BANK ET AL
MEMORANDUM

At a show cause hearing held to determine if the Bank should be enjoined from foreclosure of the property described in the complaint, the Court issued a temporary injunction stopping the sale. The Bank has filed a motion to dissolve the temporary injunction citing USCA §12-91. The parties have extensively briefed the question. Based upon the authorities cited in the briefs, it is the opinion of the Court that this Court lacks jurisdiction to issue the injunction.

Section 91 of 12 USCA reads as follows:

"*Transfer by bank and other acts in contemplation of insolvency*

All transfers of notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments

or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court." R.S. §5242.

In the case of *Pacific National Bank of Boston* v. *Mixter*, 124 U.S. 721 (1888), the Supreme Court of the United States said:

"Although the provision(s) [of Section 91 were] evidently made to secure equality among the general creditors in the division of the proceeds of the property of an insolvent bank, its operation is by no means confined to cases of actual or contemplated insolvency. The remedy is taken away altogether and cannot be used under any circumstances.

"It is further said that if the power of issuing attachments has been taken away from the state courts, so also is the power of issuing injunctions. That is true."

The rule announced in the *Mixter* case appears to have survived in an unbroken line of authority to the present time. There are only two exceptions which the Court finds in the briefs submitted by the parties. The first and most significant exception is found in the case of *Southern Alaska Canning Company* v. *Superior Court for King*

County, et al., 222 P. 203 (Wash., 1924). In that case the Bank was foreclosing a chattel mortgage and had issued notice of sale to the sheriff who took the mortgaged property into possession. The mortgagor instituted a proceeding in the Superior Court seeking to have the foreclosure transferred to that court alleging that it did not owe the Bank all of the sum set out in the notices but was entitled to a credit in a large sum. The Court issued a temporary injunction staying the action of the sheriff. This injunction was given without bond. It is true that the Court in that case used the following language:

> "That statute cannot have any weight here. Although the mortgagee was and is a national bank, it has undertaken in its foreclosure to take advantage of the statutes of this state, and it cannot take action under a part of that statute without being also bound by the other provisions of it."

However, the Court earlier in its opinion had confined its investigation to the question of whether or not the mortgagor must post bond in order to get the foreclosure removed to the Superior Court. The Court said:

> "The sole question before us is, where a mortgagor has instituted proceedings to transfer to the Superior Court a pending foreclosure by notice and sale given by the sheriff, of his chattel mortgage, must he give a bond before the Court will restrain the sheriff from further proceedings?"

So the injunction in that case was not to restrain the Bank from foreclosing but was to restrain the sheriff from proceeding after, under the laws of that state, an action had been instituted to transfer the foreclosure to the Superior Court. The action was not to stop the foreclosure but to transfer it to the court.

The only other exception discovered in the cases is where the property which is the subject of the injunction does not belong to the Bank.

Therefore, it seems to the Court to be clear that the statute above cited removes the jurisdiction of the Courts to grant temporary injunctions prohibiting the foreclosure of property in which the Bank has a security interest. Therefore, the injunction should be dissolved. Mr. Kanaday will prepare the decree.

/s/ Ben H. Cantrell
Ben H. Cantrell, Chancellor

This December 9, 1975

NO. A-6089

IMPAC LIMITED, INC., ET AL

vs.

THIRD NATIONAL BANK, ET AL

ORDER

This cause came on to be heard upon motion of Defendant, Third National Bank, to dissolve a temporary injunction against foreclosure of the property described in the complaint, said motion to dissolve being based upon the fact that the court did not have jurisdiction to grant a temporary injunction against a national bank pursuant to USCA §12-91.

It is the opinion of the court, after reading the statute and the cases cited by counsel, that the statute so cited does remove the jurisdiction of the court to grant temporary injunctions prohibiting the foreclosure of property in which the bank has a security interest.

It is accordingly ordered, adjudged and decreed that the injunction heretofore granted should be dissolved.

However, pursuant to motion of Plaintiff for a discretionary appeal from said order, and said order dissolving an injunction heretofore granted, and it further appearing that the order involves a question of law as to which there is substantial ground for difference of opinion, that question being whether a state court is prohibited by USCA §12-91 from granting a temporary injunction against a national bank when that bank has a security interest in the subject property;

It is accordingly ordered, adjudged and decreed that the Plaintiff is granted an appeal from the above order, to the Supreme Court, upon perfecting said appeal within (30) days from the date of entry of the order.

* * *

This 8th day of February, 1976

/s/ Ben H. Cantrell
Chancellor